

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION PETITION NO.873 OF 2010

Mrs.Money Nair .Petitioner
Gala No.22, Shree Sai Industries
Shrikant Industrial Compound
Road No.21, Wagle Estate,
Thane – 400 604.

V/s.

Sharekhan Limited .Respondent
A 206, Phoenix House,
Senapati Bapat Marg,
Mumbai – 400 013.

Mr. Simil Purohit with Sapna Raichure i/b T.N. Tripathi & Co,
Advocate, for the Petitioner
Mr. Deepak Sharma, Advocate, for the Respondent

CORAM : A.A.SAYED, J.

DATE : 13 MARCH, 2015

JUDGMENT

. By this Petition filed under Section 34 of the Arbitration And Conciliation Act, 1996 (hereinafter referred to as 'the 1996 Act), the Petitioner/original Respondent impugns the Award dated 21.05.2009 passed by the sole Arbitrator under the Bye-laws, Rules and Regulations of the National Stock Exchange

of India Limited (NSE) by the sole Arbitrator. The operative part of the impugned Award reads as follows:

“(i) The Respondent is directed to pay the sum of Rs.24,42,649/49 (Rupees Twenty Four Lacs Forty Two Thousand Six Hundred Forty Nine And Paise Forty Nine Only) to the applicant.

(ii) The Respondent shall pay interest at 12% p. a. on Rs.24,42,649/49 from the date of receipt of arbitration application i.e. from August 4, 2008 till date of payment.

(iii) The counter claim of the Respondent for Rs.11,06,308/60 is rejected.

(iv) The cost of arbitration shall be borne by the applicant.

(v) There is no award as to other costs and expenses.

(vi) The award is signed and issued in three originals. NSEIL may retain the stamped original and forward one original to each of the applicant and Respondent.”

2. The case of the Respondent/original Applicant before the Arbitral Tribunal was that it was a trading member of the NSE and the Petitioner/original Respondent was their constituent. The Petitioner executed Member-Client Agreement on 04.04.2007 with the Respondent and opened a trading account with them

and was allotted Client Code No. 140027. The Petitioner started trading operations in this account with the Respondent. The Respondent had issued contract notes and bills as and when trades were executed by them as per instructions of the Petitioner and the same were dispatched to the Petitioner on her email id which was given by the Petitioner to the Respondent while opening the account. The Petitioner traded in cash and derivative segment of NSE (and BSE). The Respondent had annexed a copy of the Log Report as proof of dispatch as also the Ledger to the Statement of Claim. The Petitioner did not make payment for the positions taken by her. Therefore, the Respondent requested the Petitioner to clear her debit balance. However, in spite of reminders and follow up, the Petitioner did not clear her dues. The Petitioner had issued two cheques of Rs.5,00,000/- each were dishonoured on presentation. The Respondent had sent notice for payment of the amount due as well as notice under Section 138 of the Negotiable Instruments Act in respect of dishonour of the cheques. In these circumstances, the Arbitration Application came to be filed by the Respondent on 03.07.2008 claiming a sum of Rs. 24,42,649.49 paise.

3. The Petitioner also filed an Arbitration Application later in point of time i.e. on 18.07.2008 (which was treated as a counter claim by the Arbitral Tribunal). The case of the Petitioner before the Arbitral Tribunal was that she was dealing with the Respondent's Branch at Mulund(W) for the last ten years. At the end of 18.01.2008, she was having purchase positions with expiry date of 31 January, 2008 of the scrips more particularly set out in her Statement of Claim. Her merged ledger BSE + NSE account reflected a credit balance of Rs.7,32,395.77 on 21.01.2008. Between 12.00 noon to 1.00 p.m. on 22.01.2008, Mr.Kiran, dealer from the Respondent's Mulund(W) Branch, phoned and informed her that the stock market prices were falling. She advised him that she wanted to hold on to her aforesaid F & O positions and she will make payment of Rs.20,00,000/- in the evening of 22.01.2008. On 23.01.2008, Mr.Kiran came to her office at around 11.30 a.m. and collected three cheques of Rs.5,00,000/- from her. However, he suppressed the fact that her F & O positions were already squared off on 22.01.2008 unilaterally by the Respondent. The Petitioner had addressed a letter dated 23.01.2008 to the Respondent to stop the payment of the aforesaid cheques issued

to the Respondent. She was having sufficient credit balance in her bank account which was reflecting a balance of Rs.25,00,000/-. The Petitioner had received F & O Bill No.1795323 dated 22.01.2008 which shows that the Respondent had committed grave mistakes by selling double quantities of shares than her existing actual F & O positions and then buying back the excess quantities sold by the Respondent at higher prices. The Respondent had negligently and unauthorizedly squared off her F & O positions unilaterally behind her back on 22.01.2008. The bill of 22.01.2008 was disputed and the mark to market losses amounting to Rs.25,41,834.23/- as reflected therein was denied. The Petitioner was not liable for the said losses accounted in her ledger account. On the contrary, the Respondent was liable to compensate for the gain which she would have made on her F & O positions had continued to hold them till 31.01.2008 and/or sold them at the best rates during the period between 22.01.2008 and 31.01.2008. For logical reasons, the Petitioner considered weighted average of high rates between 22.01.2008 and 31.01.2008 and worked out her claim on the Stock Futures concerned. The Respondent has not given even basic information/clarifications to the Petitioner. The

Petitioner sought payment of a sum of Rs.11,06,308.60/- with 18% p.a. interest from the due date till payment and/or till realization. The parties also filed further pleadings i.e. Rejoinder and Sur-Rejoinder.

4. The controversy involved in the present proceedings essentially is whether in view of the margin requirements including of mark to market losses, the Respondent was justified in squaring off the open positions held by the Petitioner. After hearing learned Counsel for the parties, the learned Arbitrator held as under :

"7. REASONING AND CONCLUSION

7.1 The respondent raised, inter alia, the following issues:-

(a) Applicant ... took out deliveries unilaterally from the respondent's Demat Account at BSE and sold shares of the respondent on BSE on February 15, and September 4, 2008 without her delivery instruction slip.

(b) Applicant made a counter claim of Rs.15,58,838/93 at BSE being net alleged dues Vs Rs. 24,42,649/49 at NSE.

(c) Though applicant was relying on consolidated ledger they did not consider BSE credit of Rs.9,44,324/25 (plus delay charges debited) at BSE. The counter claim of BSE was essentially the applicant's

alleged claim at NSE i.e. the applicant has duplicated the claim.

7.2 So far as the present arbitration reference is concerned, the sole arbitrator appointed by NSEIL has jurisdiction for NSE MATTERS. Accordingly, the sole arbitrator would restrict himself to issues concerning what has transpired on NSE. Indeed, the respondent had already filed an arbitration application before BSE and submitted a revised award (matter No.112 of 2008) given by the bench of Arbitrators on February 24, 2009 along with their submissions placed at the hearing held on March 3, 2009.

7.3. There is no dispute about the trades or statement of account. The entire issue hinges, solely around squaring off of F & O contracts on January 22, 2008 by the applicant without the knowledge of the respondent and her agreeing to pay in the evening. In fact, she tendered cheques for Rs.15,00,000/-. It is, therefore, necessary to re-create the events of that day. The respondent in their statement dated July 18, 2008 stated that the applicant called between 12 and 1 p.m. on January 22, 2008 to inform that the market was falling and she wanted to hold on the F & O positions by paying Rs.20,00,000/- by evening on January 23, 2008 the applicant collected 3 cheques of Rs.5,00,000/- each at 11.30 a.m. without mentioning that the positions were squared off on January 21, 2008. When she spoke to the applicant on January 23, 2008 she was advised that the position had been squared off on January 22, 2008. The respondent wrote to the applicant on January 23, 2008 not to present the cheques. Copy of this letter submitted

mentions this was advised over phone on January 22, 2008.

7.4. In their written submissions dated January 16, 2009 the respondent reiterated that 2 cheques (not 3 as stated earlier) of Rs.5,00,000/- each were collected on January 23, 2008 around 11.30 a.m. On learning that her entire F & O position was squared off on January 22, 2008. She advised the applicant about stop payment instructions. Due to Typographical error January 21, 2008 was stated earlier instead of January 22, 2008 as date of closing out trades.

7.6 In the written submissions dated April 4, 2009 the respondent states that the applicant collected 3 cheques of Rs.5,00,000/- each on January 22, 2008 evening and not 11.30 a.m. on January 23, 2008 as mentioned erroneously earlier typed version of letter dated January 23, 2008 indicates 3 cheques and confirmation of telephone call on January 22, 2008 not to present cheques as there is a dispute. The respondent was under the impression that the cheques were for MTM loss on January 22, 2008.

7.7 The above submissions are riddled with inconsistencies. There is confusion about 2 or 3 cheques as stated in different submissions. More importantly the respondent must have been aware of closing out of trades on January 22, 2008 itself and not January 23, 2008 as professed. Otherwise why did she stop payment of the cheques on January 22, 2008. If she was under the impression that this was for MTM losses the position would not have changed. In her letter the respondent refers to her

dispute informed over phone on January 22, 2008. There is no dispute about MTM losses. It can only be about squaring off F & O trades. Otherwise, why would she stop payment of cheques on January 22, 2008 itself when they had been issued in the evening. The respondent has not come with clean hands before the sole arbitrator.

7.8 The respondent was well aware of the shortfall on January 22, 2008 whether by way of MTM/Margin as she admits that the applicant phoned her. Despite this she submitted post dated cheques of January 24, 2008 whereas margins are required to be met immediately. Having regard to the large shortfall the applicant was justified in squaring off the open positions as authorized under the member-client-agreement.

7.9 As stated by the respondent the log report shows that electronic transmission of contract notes of January 22, 2008 reached only on January 30, 2008. However, hard copy was sent next day as supported by POD submitted by the applicant. Further, as stated in 7.8 above the respondent was seized of the matter.

Having considered the submissions, documents and oral arguments put forth by both the parties during the proceedings the sole arbitrator upholds the claim of the applicant. Since the counter claim of the respondent is based on the wrongful closure of F & O trades it is rejected as the liquidation of the positions by the applicant has been upheld."

(emphasis supplied)

5. Having regard to the facts and circumstance of the case and on perusal of the impugned Award including the findings reproduced hereinabove, it is amply clear that the learned Arbitrator after appreciating the evidence on record arrived at a finding of fact that the Respondent was justified in squaring off the open positions of the Petitioner. The learned Arbitrator has observed that the Petitioner was well aware of her margin requirements including mark to market losses on 22 January 2008, however, she issued post-dated cheques of 24 January 2008 and that the Petitioner had not approached the Arbitral Tribunal with clean hands. Pertinently, the said cheques returned dishonoured. It is well settled that this Court in exercise of its limited jurisdiction under section 34 of the 1996 Act does not sit in Appeal and it is not permissible for this Court to re-appreciate and re-appraise the findings of facts arrived at by the learned Arbitrator. In the facts and circumstances of the case, it cannot be said that there is any perversity in the findings of the learned Arbitrator. In any event, the view of the learned Arbitrator is certainly a possible view. In the circumstances, these findings of facts of the learned Arbitrator are not liable to be disturbed.

6. It may be stated that between 18 and 22 January 2008 there was a steep fall in the share prices and the stock market had plummeted. There is no dispute that during this period, the Petitioner was holding outstanding position in the F&O segment of NSE and had suffered heavy losses and there was continuous debit balance in her account which she was well aware of. Not only the Petitioner, but there were hundreds of Constituents (as also Trading members) who suffered heavy losses due to the huge fall in the prices of shares and there was a shortfall in their margin requirements and the margin requirements including of the mark to market losses could not be fulfilled by the Constituents during this crucial period. The Petitioner, in the present Petition, admits that she is a 'seasoned player' of the stock market. She was aware of the market condition. There is no explanation as to why the Petitioner issued post-dated cheques of 24 January 2008. The learned Arbitrator has rightly concluded that the Respondent was justified in squaring off her positions on 22 January 2008. Clause 1.7.5 of the Member-Client Agreement expressly provided that the Respondent was entitled to square off the transactions of the Petitioner for non-maintenance of required margin. Having held

that the Respondent was justified in squaring off the position of the Respondent, the learned Arbitrator had rightly rejected the counter claim of the Petitioner.

7. In ***Mr. Rajendra Kumar Bothra v/s. M/s. Ventura Securities Limited, 2010 Vol 112 (4) Bom BLR 1686***, learned Single Judge of this Court was dealing with a somewhat similar situation as the present, when the market had crashed between 18 January 2008 and 22 January 2008. The learned Single Judge while dealing with Regulation 3.10(b) of NSE Regulations observed in para 22 of the judgment as follows:

“22 ... The requirement is that the amount should be received and credited in the Account. Merely handing over of the cheque itself is not sufficient. It is always subject to realization. In the present case admittedly, even that cheque was bounced, a criminal case is pending with regard to the same. Once the cheque for whatever reason, which was handed over in the morning on 22.01.2008, but as noted, bounced, it is clear case of default so far as the constituent is concerned. In an unprecedented situation like this, a trading member just cannot be compelled to wait for longer time till realization of the cheque. Therefore, as there was admitted default in the payment, as per Rule 3.10(b) NSEIL (F & O Segment), the trading member has exercised the option to close down the transaction and squared off the same as recorded above. This action

of constituent member, therefore, in my view, is well within the agreed terms and conditions, rules and regulations, as admittedly there was no equivalent credit with the trading member. The loss in fact therefore was met by squaring off of the account as done in the present case as there was no margin money also available in the account of the constituent.”

Consequently, the learned Single Judge while dismissing the Petition held that the action of the member of Stock Exchange in squaring off was justified as per the Bye-laws, Rules and Regulations of the NSEIL, which require upfront payment of margin “each day”.

8. In ***HSBC Invest-Direct Securities (India) Ltd. v/s. Ms. Manishaben Ghanshyabai Patel, 2013(1) Bom CR 171***, learned Single Judge of this Court has considered Regulation 3.10(b) of NSE Regulations pertaining to Future and Option Segment and observed in paras 7, 9 and 10 as follows:

“7. The relevant Regulation 3.10(a) and 3.10(b) of NSE Regulations pertaining to Future and Option segment are as under:

‘3.10(a)The Trading member must demand from its constituents the margin deposit which the member has to provide under the Trading regulations in respect of business done by members for such constituents.....

3.10(b) In case of nonpayment of daily settlement by the constituent within the next trading day, the Trading member shall be at liberty to close out transactions by selling or buying the derivatives contracts as the case may be, unless the constituent already has an equivalent credit with the trading member. The loss in this regard, if any, shall be met from the margin money of the constituent.'

9. Regulation 3.10(b) deals with the non-payment of daily settlement by the constituent within the next trading day. That has nothing to do with the nonpayment of margin money. The contentions of the contract and basically clause 2, as referred above, the Arbitrator has failed to consider whereby the Respondent agrees to pay initial margins, withholding margins, special margin or such other margins as are necessary by the Member of the Exchange. The Member is also permitted to collect additional margin as per his sole and absolute discretion. The client is under obligation to pay such margins within the stipulated time. The Arbitrators further failed to consider clause 5 of the Member constituent agreement, whereby the Member is permitted to liquidate and close out all or any of the clients position for non-payment of margin or other amounts outstanding debts and adjust the profit of such liquidation or close out, if any against the client's liability and obligation. It is also agreed that any and all loss and financial charges on account of such liquidation/closing out shall be charged to and borne by the client. Therefore, the Petitioner being member is entitled to close out the transaction if the Respondent/client failed to make the margin amount or any other amount.

10. The learned Arbitrators therefore having held that there was a short-fall of margin for the Open position, but wrong in holding that the Respondent was not required to pay the margin and the Petitioners illegally squared off the position at 10.26 am on 29 October 2008. Regulation 3.10(b) cannot be referred and read to adjudicate the issue with regard to the margin money. It is applicable for non-payment of daily settlement by the constituent and not nonpayment of margin money as observed.”

9. In ***M/s. Angel Capital & Debt Market Limited v/s. Mrs. Rajkumari Laddha, 2013(7) LJSoft 99***, learned Single Judge of this Court was again considering the issue of margin requirements when there was a fall in the market between 17 January 2008 and 22 January 2008. In paras 4 and 8 of the judgment the learned Single Judge has held as follows:

“4. ...The sequence, therefore, shows that though there was shortfall right from 17 January 2008 till 21 March 2009, the Respondent failed to fulfill his obligations by making prompt payment, as required. The Petitioner, therefore, has exercised the discretion on 22 January 2008, in no way can be stated to be against the bye-laws.

8. In view of the typical market position and the nature of transaction and the bye-laws provides and permits the share brokers to exercise the discretion, as the liberty is provided to close out the transaction at appropriate position/time and if the trader

takes action accordingly by exercising his discretion and the market experience, therefore to say it is contrary to the law and/or the regulation, is unsustainable. There is nothing to justify the same except the observations so made by overlooking the factual position on record.”

10. In light of the aforesaid discussion, no interference is warranted with the impugned Award by this Court in the exercise of its limited jurisdiction under section 34 of the 1996 Act. The Petition is accordingly dismissed with no order as to costs.

(A.A. Sayed J)